Supreme Court, U.S.
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No. 98-1751

IN THE SUPREME COURT
OF THE
UNITED STATES OF AMERICA

October Term, A.D., 1999

Faye Dabney,
Petitioner,

v.

Robert E. Rubin in his Capacity as Secretary of the Treasury, and the Commissioner of the Internal Revenue Service,
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO
The United States Circuit Court Of Appeals
For The Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

I. Does the Plaintiff have a due process right to present arguments relative to the merits of an issue presented by petition for declaratory judgment prior to the court summarily entering judgment on the issue?

II. Is Treasury Regulation (26 C.F.R.) § 301.6203-1, an unreasonable interpretation of § 6203, and/or repugnant to the due process clause of the fifth article in amendment to the Constitution of the United States, and invalid?

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II. The court of appeals has sanctioned a departure from the accepted and usual course of judicial proceedings by the District Court so as to call for an exercise of this court's supervisory power. 5

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In The
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October Term, A.D. 1998

Faye Dabney,

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Robert E. Rubin in his Capacity as Secretary of the Treasury, and the Commissioner of the Internal Revenue Service,

Respondents.

Petition For Writ Of Certiorari To
The United States Circuit Court Of Appeals
For The Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

Faye Dabney respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit, is unpublished, referenced at 166 F.3d. 1220 (1999). The opinion of the United States District Court is also unpublished, reference cite unknown.

STATEMENT OF THE JURISDICTION

The United States Court of Appeals for the Tenth Circuit entered its decision and mandate on January 28, 1999. The statutory provision believed to confer jurisdiction to review the judgment in question on a writ of certiorari is 28 U.S.C. § 1254.

Notifications required by Rule 29.4(b) have been made.

STATUTORY and CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Article in amendment to the Constitution for the United States provides in part:

"No person shall be . . . deprived of life, liberty or property without due process of law . . ."

26 U.S.C. §6203 provides that,;

"The assessment shall be made by recording the liability of the taxpayer in the office of the Secretary in accordance with the rules or regulations prescribed by the Secretary. Upon request of the taxpayer, the Secretary shall furnish the taxpayer a copy of the record of the assessment."

26 § 301.6203-1 provides that:

"The assessment shall be made by an assessment officer signing the summary record of assessment. The summary record, through supporting records, shall provide identification of the taxpayer, the character of the liability assessed, the taxable period, if applicable, and the amount of the assessment . . . The date of the assessment is the date the summary record is signed by an assessment officer."

STATEMENT OF THE CASE

This civil action was initiated by complaint, designated Petition for Declaratory Judgment, filed October 17, 1996, by Faye Dabney, ("Dabney") on her own behalf, requesting declaratory relief regarding the meaning of the statutory obligation of the Secretary of the Treasury to furnish the taxpayer a copy of a record of assessment under 26 U.S.C. § 6203, and challenging the validity of Treasury Regulation, 26 C.F.R. § 301.6203-1. Dabney also requested relief in the nature of mandamus to require compliance with the duty prescribed by 26 U.S.C. § 6203 to furnish Dabney with a copy of the record of the assessment of tax liability upon request.

On December 18, 1996, the United States, through the United States Attorney and the Department of Justice, moved to dismiss the action, asserting insufficiency of service of process; that the United States is the proper defendant; the inapplicability of the Declaratory Judgment Act, 28 U.S.C. § 2201, and the doctrine of sovereign immunity. On December 20, 1996, Dabney was ordered to show cause why this civil action should not be dismissed for lack of jurisdiction as argued in the government's motion to dismiss.

Dabney filed her response on January 16, 1997, clarifying her pleading to explain that she seeks both declaratory judgment and mandamus relief based on the Secretary's failure to perform the duty mandated by 26 U.S.C. § 6203. Dabney filed a motion for leave to file an amended complaint on June 9, 1997. On June 20, 1997, this court entered an Order Denying the Motion to Dismiss and accepting the amended complaint. (See Appendix A) In said order the court also ruled on the question of law raised by Dabney in her original petition and amended complaint for declaratory judgment, finding that the regulation "is a valid interpretation of the enabling legislation." (See Appendix A-3) At the scheduling conference on July 30, 1997, the court ruled that the suit was limited to a mandamus action to compel the performance of a non-discretionary duly by the Secretary of Treasury and that any additional issues would be beyond the court's jurisdic-

tion. Pursuant to the court's suggestion at the scheduling conference, the defendant filed a motion for summary judgment on August 20, 1997, attaching a declaration of Susan Berson, Senior Trial Attorney in the Tax Division of the Department of Justice, and a declaration of Revenue Agent Michael Sweeney, with exhibits A-D attached.

Dabney responded to the defendant's motion for summary judgment by a pleading designated Plaintiff's Combined Motion for Summary Judgment, Motion to Strike Impertinent, Immaterial and Prejudicial Matters from the Defendant's Motion for Summary Judgment and Response to Defendant's Motion for Summary Judgment. On November 17, 1997, the defendant filed a response to Dabney's Motion for Entry of Judgment on her combined motion. On December 4, 1997, Dabney replied. The court construed Dabney's motion to be a cross motion for summary judgment.

On January 27, 1998, the district court granted summary judgment in favor of the Defendants, finding that the attachments provided by the defendants with their motion for summary judgment were sufficient to satisfy the requirements of 26 C.F.R. §301.6203-1 and dismissed the case with prejudice.

On appeal to the Tenth Circuit, the Court of Appeals heard the case de novo, but abstained from ruling on the question of law challenging the validity of the regulation, and on January 28, 1999, entered an order and judgment affirming the final judgment of the District Court, "for substantially the reasons stated in that court's order." (See Appendix D-2.)

The basis for federal jurisdiction in the court of first instance was 28 U.S.C. §§ 1331, 1346(a)(2), 1361.

REASONS FOR GRANTING THE WRIT

I. The court of appeals has so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's supervisory power.

II. The court of appeals has sanctioned a departure by the District Court so far from the accepted and usual course of judicial proceedings so as to call for an exercise of this Court's supervisory power.

A ruling on the question of law concerning the invalidity of 26 C.F.R. §301.6203-1 was summarily entered by the District Court in its order denying the defendant's motion to dismiss (See Appendix A pg.3). Due to the summary nature of the ruling, Dabney was denied an opportunity to present argument proving the invalidity of 26 C.F.R. §301.6203-1.

Nothwithstanding the Court of Appeals' duty to adjudicate questions of law de novo, Allis Chalmers Credit Corp., et al. v. Tri-State Equipment, Inc., 792 F.2d 967 (10th Cir.1986); Vibra-Tech Engineers, Inc. v. United States, 787 F.2d 1416 (10th Cir.1986); Ruti-Sweetwater, Inc., In re, 836 F.2d 1263,1266 (C.A.10 (Utah) 1988), the appellate court failed to adjudicate the issue, tacitly affirming the District Court's summary ruling.

The question of law concerns a challenge to the validity of 26 C.F.R. §301.6203-1 on grounds that the regulation circumvents congressional mandates prescribed by 26 U.S.C. §6203, by 1) relieving the Secretary of the obligation to make assessments by recording taxpayer liability; 2) relieving the Secretary of the duty to furnish factual evidence that his obligation to record the liability is accomplished; 3) delegating unbridled discretion to assess income taxes arbitrarily and capriciously; and 4) overriding prescribed due process.

In support of its summary ruling on the question of law deeming the regulation valid, the district court relied on Koff v. United States, 3 F.3d 1297 (9th Cir. 1993). (See Appendix A-3) *Koff* has nothing to

do with the question of law concerning the validity of the regulation. *Koff* merely referenced the regulation in the context that certain papers furnished by the IRS—paperwork analogous to that provided to Dabney during the course of the proceedings in the District Court—satisfied the requirements of the corresponding regulation, and therefore the statute, *due primarily to the want of factual evidence rebutting the presumption established by the papers*. Note that it was not found in either case that the papers satisfied the requirements of 26 U.S.C. § 6203, but rather that the paperwork was sufficient to satisfy the requirements of §301.6203-1 which "represents a *permissible* interpretation of section 6203 and we are therefore bound to give it deference." *Koff*, at 1298. [Emphasis added] In the absence of a challenge to the validity of the regulation, deference is ordinarily owed to a regulation if it can be concluded that the regulation is found to implement the law in some ***reasonable*** manner. Bingler v. Johnson, 394 U.S. 741,750, 89 S.Ct. 1439, 1445, 22 L.Ed.2d 695. Unlike *Koff*, this case raises the fundamental question challenging the validity of the regulation, and hence the deference otherwise owed thereto.

Dabney was denied the opportunity to argue these points by both the District Court and the Court of Appeals.

In the instant case Dabney contacted the Secretary to obtain a copy of the record of the assessment of the tax liability imposed against Dabney to the end of acquiring substantive, factual evidence that the notice of federal tax lien recorded in the county of her residence was based on a factual assessment. § 6203 obliges the Secretary to furnish such evidence, i.e., *the record of the assessment*, upon request. Having reason to believe that no liability is recorded as required by § 6203 for the tax years of concern, Dabney made a request to the Secretary to furnish her with evidence of the recorded liability. The Secretary failed to furnish the evidence.

By summarily ruling that the regulation is valid, the District Court denied Dabney an opportunity to present an argument supporting her assertion that the regulation is invalid. In so doing the court relieved the Secretary of his duty to provide Dabney with factual evi-

dence demonstrating that the provisions of 26 U.S.C. § 6203 had been complied with, thereby depriving Dabney of the due process prescribed by §6203, and blocking Dabney's effort to procure substantive evidence sufficient to rebut the *presumption* of compliance established by paperwork provided during the course of the proceedings in District Court.

Having summarily disposed of the issue concerning the validity of the regulation, the District Court relied on *Koff* and James v. United States, 970 F.2d 750, 755 (10th Cir. 1992) to support its order dismissing the case, determining that the Secretary had met the requirements of the regulation by providing Dabney with papers during the course of the proceeding.

This begs the question: If papers furnished under 26 C.F.R. §301.6203-1 merely suffice to establish the presumption that a tax liability is recorded as prescribed by §6203, *in the absence of factual evidence to the contrary,* what remedy is provided to Dabney to compel the Secretary to furnish the *factual* evidence, as prescribed by §6203, sufficient to rebut the presumption?

CONCLUSION

The District court deprived Dabney of the opportunity to present her argument by summarily disposing of the question of law. The Court of Appeals failed to consider the question of law de novo on appeal.

26 U.S.C. § 6203 required the Secretary to make an assessment of income tax by recording the liability of a taxpayer, and to furnish a copy of the recorded liability, i.e., *the record of the assessment*, upon demand of the taxpayer. 26 C.F.R. § 301.6203-1 circumvents that duty, relieving the Secretary's obligation to record taxpayer liability and to furnish evidence of the fact on demand of the taxpayer, thereby shifting the burden to Dabney to prove that the liability was not recorded while depriving her of the ability to acquire evidence of such fact; a regulatory scheme contrary to the due process provision of §6203 and article V of the Constitution of the United States.

By affirming the District Court's summary action disposing of the question of law and failing to hear the question of law de novo, the Court of Appeals both sanctioned a departure, and so far departed, from the accepted and usual course of judicial proceedings, that Dabney has been deprived of both due process and a judgment to which she is entitled, as secured by the due process provision of Article V of the United States Constitution.

This Petition for Writ of Certiorari should be granted to address the foregoing issues.

Respectfully submitted,

Faye Dabney

Faye Dabney

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Chief Judge Richard P. Matsch

Civil Action Number 96-M-2425

Faye Dabney,

Plaintiff,

v.

ROBERT E. RUBIN IN HIS CAPACITY AS SECRETARY OF THE TREASURY, THE COMMISSIONER OF THE INTERNAL REVENUE SERVICE,

Defendants.

ORDER DENYING MOTION TO DISMISS

The Plaintiff, Faye Dabney, filed a pleading designated as "Petition for Declaratory Judgment" on October 17, 1996, alleging that a revenue officer of the Internal Revenue Service filed a notice of federal tax lien against her on March 10, 1995, in El Paso county, Colorado. On December 7, 1995, Ms. Dabney made a written request to the Secretary of the Treasury ("Secretary") that she be furnished with copies of the records of her tax assessments pursuant to 26 U.S.C. § 6203. That statute provides: "Upon request of the taxpayer a copy of the record of the assessment."

The plaintiff further alleged that on January 19, 1996, she received a letter from the Ogden Service Center, sending copies of transcripts of her 1990 and 1992 tax accounts, and citing 26 C.F.R. §

301.6203-1 as the relevant authority for satisfying Dabney's request for the record of assessment. That regulation reads:

> If the taxpayer requests a copy of the record of assessment, he shall be furnished a copy of the pertinent parts of the assessment which set forth the name of the taxpayer, the date of assessment, the character of the liability assessed, the taxable period, and the amounts assessed.

The plaintiff alleges that she wrote two additional letters to the Secretary requesting the records of tax assessment and notifying him that she intended to bring a mandamus action to compel his performance with the statutory requirement. Ms. Dabney asks for a declaratory judgment defining the scope of the Secretary's duty to provide records under 26 U.S.C. §6203 and a determination whether the regulations promulgated pursuant to 26 U.S.C. § 6203 are valid. Additionally, she seeks relief in the nature of mandamus compelling the Secretary to furnish the records of her tax assessment.

The United States Attorney moved to dismiss for lack of subject matter jurisdiction because the plaintiff seeks declaratory relief which is prohibited in tax proceedings. The motion also addresses other matters not relevant to the plaintiff's claim. The plaintiff moved to file an amended complaint on June 9, 1997, and tendered an amended complaint which is now accepted. It makes clear that the plaintiff seeks a writ of mandamus compelling the Secretary to comply with his statutory obligations under 26 U.S.C. § 6203 and 26 C.F.R. § 301.6203-1.

In a mandamus action, the plaintiff must demonstrate that she is owed a clearly defined ministerial duty by the government official against whom the writ is sought. Marathon Oil Co. v. Lujan, 751 F.Supp. 1454, 1463 (D. Colo. 1990). The duty to be performed must be nondiscretionary. Hecker v. Ringer, 466 U.S. 602, 616 (1983). Mandamus may not issue unless the party seeking relief has no other available remedy. Marathon Oil, 751 F. Supp. at 1463.

The duty to provide records of a tax assessment upon request is framed in nondiscretionary terms both in 26 U.S.C. § 6203 and in the accompanying regulations. Although Ms Dabney challenges the validity of the regulation at 26 C.F.R. §301.6203-1 it is a valid interpretation of the enabling regulation and defines the information that must be included in the records to be furnished. See e.g. Koff v. U.S., 3 F.3d 1297 (9th Cir. 1993).

Because this court has construed plaintiff's amended complaint as a request for relief in the nature of mandamus, the defendant's motion to dismiss for lack of jurisdiction is denied.
Upon the forgoing it is now

ORDERED that the defendant's motion to dismiss is DENIED, and it is further ORDERED that the defendant answer the second amended complaint in a manner consistent with this opinion.

Dated: June 20th, 1997

BY THE COURT:

Richard P. Matsch, Chief Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Chief Judge Richard P. Matsch

Civil Action Number 96-M-2425

Faye Dabney,

Plaintiff,

v.

ROBERT E. RUBIN IN HIS CAPACITY AS SECRETARY OF THE TREASURY, THE COMMISSIONER OF THE INTERNAL REVENUE SERVICE,

Defendants.

ORDER FOR ENTRY OF JUDGMENT OF DISMISSAL

This civil action was initiated by complaint, designated Petition for Declaratory Judgment, filed October 17, 1996, by Faye Dabney, on her own behalf, requesting declaratory relief regarding the meaning of the statutory obligation of the Secretary of the Treasury to furnish the taxpayer a copy of a record of assessment under 26 U.S.C. § 6203, and the validity of a regulation, 26 C.F.R. § 301.6203-1. The plaintiff also requested relief in the nature of mandamus to require compliance with the statutory obligation.

On December 18, 1996, the United States, through the United States Attorney and the Department of Justice, moved to dismiss this action, asserting insufficiency of service of process; that the United States is the proper defendant; the inapplicability of the Declaratory Judgment Act, 28 U.S.C. § 2201, and the doctrine of sovereign immu-

nity. On December 20, 1996, the plaintiff was ordered to show cause why this civil action should not be dismissed for lack of jurisdiction as argued in the government's motion to dismiss.

The Plaintiff filed her response on January 16, 1997, clarifying her pleading to explain that she seeks relief from the failure of the Secretary to perform the duty mandated by 26 U.S.C. § 6203. The plaintiff filed a motion for leave to file an amended complaint on June 9, 1997. On June 20, 1997, this court entered its order accepting the amended complaint as an action for relief in the nature of mandamus under 26 U.S.C. § 1361, and, accordingly, denied the motion to dismiss. At a scheduling conference on July 30, 1997, the court reaffirmed that ruling that the suit was limited to a mandamus action to compel the performance of a non-discretionary duly by the Secretary of Treasury and that any additional issues would be beyond the court's jurisdiction. Pursuant to the court's suggestion at the scheduling conference, the defendant filed a motion for summary judgment on August 20, 1997, attaching a declaration of Susan Berson, Senior Trial Attorney in the Tax Division of the Department of Justice, and a declaration of Revenue Agent Michael Sweeney, with exhibits A-D attached.

The plaintiff responded to that motion for summary judgment by a pleading designated Plaintiff's Combined Motion for Summary Judgment, Motion to Strike Impertinent, Immaterial and Prejudicial Matters from the Defendant's Motion for Summary Judgment and Response to Defendant's Motion for Summary Judgment. On November 17, 1997, the defendant filed a response to plaintiff's motion for entry of judgment on that combined motion and on December 4, 1997, the plaintiff replied. The court construes these pleadings to be cross motions for summary judgment.

Although there is some factual dispute with respect to Ms. Dabney and what she received from the Internal Revenue Service before this lawsuit began, it is clear that she has received copies of the attachments to the declaration of Revenue Agent by service made on her of the defendant's motion and by a mailing under Fed. R. Civ. P. 26 by Susan Berson. What appears, then, is Ms. Dabney was notified that

the Internal Revenue Service did not receive federal income tax returns from her for the years of 1992 through 1994; that Agent Sweeney prepared calculations of income and taxes due from work papers, attached to his declaration; and that notices of deficiency and notices of intent to levy were prepared and sent. A Form 4340, Certificates of Assessments and Payments for Faye G. Dabney, for the tax periods December 31, 1992 through December 31, 1994, consisting of five pages, is attached as exhibit A to the Sweeney declaration. The defendant's position is that these papers satisfy the requirements of the statute, 26 U.S.C. § 6203 and the regulation 26 C.F.R. § 301.6203-1. The Tenth Circuit Court of Appeals so held in 970 F.2d 750, 755, (10th Cir. 1992) and the Ninth Circuit Court of Appeals in Koff v. United States, 3 F.3d 1297 (9th Cir. 1993), upheld the validity of the regulation that interprets § 6203.

The plaintiff recognizes the holdings of these cases, but makes a textual argument that the regulation is an unreasonable interpretation of the statute and that the regulation is invalid as a deprivation of due process of law. Ms. Dabney asserts that the rules of grammar require an interpretation of § 6203 that the phrase "recording the liability" defines an obligation of the Secretary to pass regulations concerning the making of a "record of liability," that no such regulations exist and, therefore, "there can be no record of assessment" and, thus, no compliance with the statute. The argument is invalid because it disregards other provisions of the Internal Revenue Code and Treasury Regulations which authorize the Secretary, through his delegates, to do that which was done in this case, compute and assess Internal Revenue taxes where no returns were filed by the taxpayer. The regulation provides that if a taxpayer requests a copy of the record of assessment, what will be provided is the pertinent parts setting forth the name of the taxpayer, the date of assessment, the character of the liability assessed, the taxable period and the amount assessed. All of that is contained in what has been provided to the plaintiff in this case. In sum, this court concludes that the documents submitted to the plaintiff in the course of this litigation satisfy the obligation of the Secretary of the Treasury to provide her with a record of assessment of the years in question, required by 26 U.S.C. § 6203, and is therefore ORDERED

that the complaint and amended complaint, seeking a writ of mandamus, are dismissed with prejudice and the Clerk shall enter judgment accordingly.

Dated January 27, 1998
BY THE COURT:

Richard P. Matsch, Chief Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Chief Judge Richard P. Matsch

Civil Action Number 96-M-2425

Faye Dabney,

Plaintiff,

v.

ROBERT E. RUBIN IN HIS CAPACITY AS SECRETARY OF THE TREASURY, THE COMMISSIONER OF THE INTERNAL REVENUE SERVICE,

Defendants.

JUDGMENT

Pursuant to the Order for Entry of Judgment of Dismissal by Chief Judge Matsch dated January 27, 1998, it is

ORDERED AND ADJUDGED that the complaint and amended complaint are dismissed with prejudice.

Dated: January 27, 1998

FOR THE COURT

JAMES R. MANSPEAKER

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Faye Dabney,	)	
	)	
Plaintiff-Appellant,	)	
	)	
v.	)	No. 98-1114
	)	D.C. No. 96-M-2425
	)	(D. Colo.)
ROBERT E. RUBIN, in his capacity as Secretary of the Treasury; COMMISSIONER OF THE INTERNAL REVENUE SERVICE,	)	
	)	
Defendants-Appellees,	)	

ORDER AND JUDGMENT*

Before ANDERSON, KELLY and LUCERO, Circuit Judges

After examining the brief and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

Plaintiff appeals the district court's decision granting summary judgment. This court reviews such a decision de novo. See Wilson v. Merrel Dow Pharmaceuticals, Inc., 160 F.3d 625, 629 (10th Cir. 1998).

26 U.S.C. § 6203 provides that a tax assessment "shall be made by recording the [taxpayer's] liability" in the Secretary's office "in accordance with rules or regulations prescribed by the Secretary." Under 26 C.F.R. § 301.6203-1, an assessment is made when an assessment officer signs the summary record of assessment."

Section 6203 also requires that, upon a taxpayers request, "the Secretary shall furnish the taxpayer a copy of the record of the assessment." Plaintiff requested copies of the record of assessments made against her. The Secretary, pursuant to § 301.6203-1, provided plaintiff with a "copy of the pertinent parts of the assessment," including the taxpayer's name, the date of the assessment, the character of the tax liability assessed, the taxable period involved, and the amounts assessed.

Plaintiff argues that § 301.6203-1 fails to implement the Secretary's statutory duties under § 6203. We affirm the district court's decision for substantially the reasons stated in that court's order dated January 27, 1998.

The mandate shall issue forthwith.

Entered for the Court,

Paul J. Kelly, Jr.
Circuit Judge

§ 301.6203-1 Method of assessment.

The district director and the director of the regional service center shall appoint one or more assessment officers. The district director shall also appoint assessment officers in a service Center servicing his district. The assessment shall be made by an assessment officer signing the summary record of assessment. The summary record, through supporting records, shall provide identification of the taxpayer, the character of the liability assessed, the taxable period, if applicable, and the amount of the assessment. The amount of the assessment shall, in the case of a tax shown on a return by the taxpayer, to be the amount so shown, and in all other cases the amount of the assessment shall be the amount shown on the supporting list or record. The date of the assessment is the date the summary record is signed by an assessment officer. If a taxpayer requests a copy of the record of assessment, he shall be furnished a copy of the pertinent parts of the assessment which set forth the name of the taxpayer, the date of assessment, the character of the liability assessed, the taxable period, if applicable, and the amounts assessed.

* This order and judgment is not binding precedent, except under the doctrines of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3